UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

UPMC AND ITS SUBSIDIARY, UPMC PRESBYTERIAN SHADYSIDE, SINGLE EMPLOYER, d/b/a UPMC PRESBYTERIAN HOSPITAL AND d/b/a UPMC SHADYSIDE HOSPITAL	Cases:	06-CA-102465 06-CA-102494 06-CA-102516 06-CA-102518 06-CA-102525 06-CA-102534 06-CA-102540 06-CA-102542 06-CA-102544 06-CA-102555 06-CA-102559 06-CA-102566 06-CA-104090 06-CA-104104 06-CA-106636 06-CA-107127 06-CA-107431 06-CA-107532 06-CA-107896 06-CA-108547 06-CA-111578 06-CA-115826
and		
SEIU HEALTHCARE PENNSYLVANIA, CTW, CLC		

RESPONDENT'S MOTION FOR FULL-BOARD RECONSIDERATION

Under Section 102.48(c) of the Rules and Regulations of the National Labor Relations Board ("NLRB" or the "Board"), Respondent, UPMC Presbyterian Shadyside ("Presbyterian Shadyside" or the "Hospital"), moves for reconsideration by the full Board of the August 27, 2018 Decision and Order, published at 366 NLRB No. 185 (the "Decision").[1]

The Board made three material errors in the Decision that warrant reconsideration. First, the Board erred by imposing extraordinary remedies that are without adequate justification in the record and at odds with prior Board precedent. Second, the Board erred by appearing to implicitly create a new subjective standard in the context of employer investigations that is

[1] Respondent UPMC remains in the case solely as a guarantor of any remedies ultimately ordered; there are no independent unfair labor practice allegations at issue against UPMC. *UPMC*, 366 NLRB No. 185, 2 n. 7 (2018).

unworkable and ill-defined, and which imposes a hardship on employers as they attempt to comply with the National Labor Relations Act ("NLRA" or the "Act"). And, third, the Board erred by reaching factual and legal conclusions based on misstatements of the record. For all of these reasons, the Board should reconsider and reverse its Decision.[2]

I. PROCEDURAL HISTORY

This matter stems from unfair labor practice charges filed by the Charging Party Union, SEIU Healthcare Pennsylvania (the "Union" or the "SEIU"), concerning conduct that allegedly occurred from late 2012 through mid-2013. The unfair labor practice allegations were filed in the midst of a corporate campaign the SEIU began in 2012 focused on a subset of Presbyterian Shadyside employees. Presbyterian Shadyside is a Level 1 trauma center operating acute care hospitals providing inpatient and outpatient medical care in and around Pittsburgh, Pennsylvania. The SEIU's organizing campaign has not, despite the passage of more than six years, led to the filing of a petition for representation of any of the employees identified by the SEIU for organizing.

The unfair labor practice allegations were consolidated, a Complaint was issued and answered (and amended multiple times), and ultimately a hearing was held. On November 14, 2014, Administrative Law Judge Mark R. Carissimi (the "ALJ") issued a Decision (the "ALJ Decision"). After the ALJ Decision, exceptions were filed by Respondents UPMC and Presbyterian Shadyside, as well as by the General Counsel and the SEIU. These exceptions were fully briefed by the parties and remained at the Board for nearly four years until its issuance of the August 27, 2018 Decision. In the Decision, the Board affirmed a number of alleged unfair

[2] Presbyterian Shadyside filed 298 exceptions to the Administrative Law Judge's Decision. It expressly preserves and reiterates all arguments previously made to the Board in support of its exceptions. Consistent with the Board's Rules and Regulations, the focus of this Motion is exclusively on arguments that have not previously been addressed to the Board. Respondent urges the Board to reconsider its Decision in its entirety on the grounds identified in Respondent's exceptions and supporting briefing.

labor practices found by the ALJ, severed certain allegations for a later decision, and overturned certain other findings and conclusions of the ALJ. On September 5, 2018, the SEIU filed a Petition for Review of the NLRB's Decision with the United States Court of Appeals for the District of Columbia Circuit. *Serv. Emps. Int'l Union Healthcare Pennsylvania, CTW, CLC v. NLRB*, No. 18-1237 (D.C. Cir. 2018 filed Sept. 5, 2018). The SEIU also petitioned for review of an earlier Board decision concerning Respondent UPMC's status as a guarantor of any remedies ultimately ordered in this matter.

II. ARGUMENT

A. Relevant Legal Standard

Section 102.48(c) of the Board's Rules and Regulations provides that "[a] party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record after the Board decision or order." 29 C.F.R. § 102.48(c). "A motion for reconsideration must state with particularity the material error claimed and with respect to any finding of material fact, must specify the page of the record relied on." 29 C.F.R. § 102.48(c)(1).

A motion for reconsideration must be filed within 28 days of service of the Board's decision or order. 29 C.F.R. § 102.48(c)(2). Despite the filing of the Petition for Review, the Board maintains jurisdiction of this matter. Specifically, "until a transcript of the record in a case is filed in a court, within the meaning of section 10 of the Act, the Board may at any time upon reasonable notice modify or set aside, in whole or in part, any findings of fact, conclusions of law, or order made or issued by it." 29 C.F.R. § 102.49; *see also* 29 U.S.C. § 160.

B. Statement of Material Errors that the Board Should Reconsider

The Board made the following material errors that warrant reconsideration:

- The Board erred by issuing punitive and unjustified extraordinary remedies. *UPMC*, 366 NLRB No. 185, 7-9 (2018).

- The Board erred by appearing to fashion a new and impossible to apply legal standard for the evaluation of employer investigatory interviews. *Id.* at 3-4.

- The Board erred by misstating the record and relevant evidence to reach conclusions with respect to the ESS Council allegations. *Id.* at 4-6.

C. The Board Made Material Errors in Issuing Punitive and Inappropriately Expansive Remedies

In its Decision, the Board issued a remedy that was rejected by the ALJ below: a 120-day notice posting period. The Board also expanded a notice reading remedy ordered by the ALJ by granting the Union access to the Hospital for any notice reading meetings. These extraordinary remedies suffer from at least two material errors that require reconsideration: (a) they are inappropriately punitive in nature; and (b) the Board failed to articulate with any specificity why such extraordinary relief is required to cure the alleged unfair labor practices at issue in this case.

The Board's power to order remedies when unfair labor practices are found is directly derived from Section 10(c) of the National Labor Relations Act (the "NLRA" or the "Act"). 29 U.S.C. § 160(c). Under the Act, if the Board concludes that unfair labor practices have occurred, it is authorized only to "issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this [Act]." *Id.* As held by the Supreme Court, "this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board

be of the opinion that the policies of the Act might be effectuated by such an order." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 235-36 (1938).

Thus, since *Consolidated Edison*, Board cases are clear that "the Board's powers under Section 10(c) of the Act are remedial, not punitive." *Am. Eagle Protective Servs. Corp. & Paragon Sys., Inc.*, 366 NLRB No. 144 (2018). Indeed, it is a "settled principle" that the remedy ordered by the Board "must be sufficiently tailored to expunge only the *actual*, and not merely *speculative* consequences of the unfair labor practices." *Douglas Autotech Corp.*, 357 NLRB 1336, 1345 (2011) (quoting *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 900, 902-904 (1984)) (emphasis in original). The Board has consistently been mindful of the need to issue appropriate and tailored remedial orders, stating "[t]o be sure, since Congress has invested us, and not the courts, with broad discretion in the exercise of our remedial powers, we feel a concomitant responsibility to be ever mindful of the manner most appropriate for effectuating the policies of the Act in each case to come before us." *Heck's, Inc.*, 215 NLRB 765, 768 (1974). And, when the Board imposes extraordinary, or special, remedies, it is incumbent on it to clearly articulate why traditional remedies are insufficient. *Federated Logistics & Operations*, 340 NLRB 255, 260-61 (2003) (Battista, dissenting in part) ("Precisely because these remedies are 'extraordinary' or 'special', the Board must demonstrate, as a precondition for granting these remedies, why traditional remedies will not sufficiently ameliorate the effect of the unfair labor practices found."). It failed to do so here.

The Board has, for decades, consistently imposed a 60-day posting period as part of its remedial orders in the context of unfair labor practice findings. *See S. Saddlery Co.*, 90 NLRB 1205 (1950) (imposing 60-day posting requirement and affirming a finding that employer engaged in certain unfair labor practices, including refusing to bargain in good faith); *R.L. Sweet*

Lumber Co., 207 NLRB 529 (1973) (ordering 60-day posting requirement in connection with finding that employer rendered unlawful assistance and support to the Teamsters, refused to bargain collectively with the employees' exclusive representative, and unilaterally changed the terms and conditions of employment); *Gen. Motors Corp.*, 257 NLRB 1068 (1981) (imposing 60-day posting requirement for employer's failure to bargain collectively and in good faith with the union).[3]

Here, however, the Board doubled the standard posting period based on a loosely justified conclusion that it was "warranted" due to the "number and serious nature" of the Respondent's violations "which permeated the Union's campaign to organize a unit of 3500 Shadyside employees." *UPMC*, 366 NLRB No. 185, 7 (2018). This justification for the extraordinary relief is at odds with the record. Although the Union's organizing campaign has been ongoing for more than six years, this case involved only a handful of unremarkable 8(a)(1), 8(a)(2), 8(a)(3), and 8(a)(4) claims that purportedly occurred during a roughly six-month period. (*See* Am. Compl.) And, during the time of the alleged unfair labor practices, Presbyterian Shadyside was working diligently to train nearly 1,200 managers as part of an earlier informal Board settlement. Across the thousands of employees and 300 departments at Presbyterian and Shadyside Hospitals, (Hr'g Tr. vol. 14, 2230:11-24), only 14 employees claimed to have been involved in some fashion with one of the alleged unfair labor practices. Less than 3% of the

[3] *See also Alwin Mfg. Co., Inc.*, 326 NLRB 646 (1998) (requiring employer to post notice for 60 days and affirming violations of the Act, including that employer violated Sections 8(a)(5) and (1) of the Act by unilaterally implementing its final contract proposal); *Albertsons, Inc.*, 351 NLRB 254 (2007) (requiring employer to post notice for 60 days upon finding employer maintained unlawful confidentiality rule, among other violations); *J & R Flooring, Inc.*, 356 NLRB No. 9 (2010) (describing how the Board's notice posting requirement "has been an essential element of the Board's remedies for unfair labor practices since the earliest cases under the Act" and discussing the "remedial goals" of the requirement and how its "standard notice posting provision" requiring respondents to post a remedial notice for a period of 60 days achieves such goals); *Aerotek, Inc.*, 365 NLRB No. 2 (2016) (imposing 60-day posting period and affirming findings that employer violated Section 8(a)(3) by refusing to hire four applicant electricians who were union members and Section 8(a)(1) by prohibiting employees from discussing each other's wages).

departments at these hospitals were even alleged to have some involvement in purported unfair labor practices. Given these undisputed facts, the Board failed to justify why an extended notice posting is required (this is particularly true given that other extraordinary remedies had already been ordered, as discussed below).

As support for an expanded notice period, the Board relied on two decisions, *Ozburn-Hessey Logistics, LLC*, 366 NLRB No. 177 (2018) and *Pacific Beach Hotel*, 361 NLRB No. 65 (2017). Not only do these decisions post-date the relevant proceedings, they are also based on markedly different fact patterns. For instance, in *Pacific Beach Hotel*, the employers had a "10-year history of violations before [the Board] and the Federal courts." *Pacific Beach Hotel*, 361 NLRB at 709. There, despite having been found in violation of "multiple provisions of the Act, having been found to have engaged in objectionable conduct that interfered with elections on two occasions, having been subject to two Section 10(j) injunctions, and having been found in contempt of court for violating a Federal district court's injunction," the employers' "egregious and pervasive" violations of the Act at issue demonstrated that they "*still have not complied* with the remedial obligations imposed on them during our earlier encounters. Rather, they have continued to engage in unlawful activity, some of which repeatedly targeted the same employees for their protected activity and detrimentally affected collective bargaining." *Id.* at 710 (emphasis in original). Given the scope, nature, and repetition of the violations at issue, *Pacific Beach* has been described as a "once-in-a-generation case" by NLRB Chairman Ring. *See Ozburn-Hessey Logistics*, 366 NLRB No. 177 (Chairman Ring, dissenting).

Similarly, the employer in *Ozburn-Hessey Logistics* was a serial repeat offender. As the Board noted, "[w]ith this decision, the Board has now issued six decisions finding that the Respondent has engaged in serious and widespread violations of the Act since 2009, when the

Union's initial organizing drive began." *Ozburn-Hessey*, 366 NLRB at *16. Moreover, in its sixth decision, the Board found, among other violations, that the employer unlawfully discharged the primary union organizer, for a second time, ***after a court ordered his reinstatement***, and unlawfully removed union literature from employee break rooms three times, including the removal of a copy of ***a judge's order that commanded the employer to cease and desist from removing union literature from break rooms***. *Id.* The list of past and current violations was almost innumerable, leading the Board to conclude "[b]y any measure, this is an extraordinary record of law breaking, and it merits an extraordinary response." *Id.*

Here, in contrast, there is no longstanding and "extraordinary" record of law breaking. Rather, before this matter, Presbyterian Shadyside had been involved in one prior case relating to the SEIU's organizing activities. The allegations at issue there were settled through a non-Board settlement in early 2013, as a part of which Presbyterian Shadyside expressly disclaimed any violation of the Act. The General Counsel presented no evidence that Presbyterian Shadyside had a "proclivity" to violate the Act. To the contrary, the record showed that the Hospital has a record of decades of productive bargaining relationships with this and other unions without a high incidence of unfair labor practice charges or alleged violations of the Act. Despite the Supreme Court's counseling against speculative and punitive remedies, the Board's imposition of a 120-day notice period was neither narrowly tailored to remedy the unfair labor practices alleged here, nor required to cure the harm allegedly at issue. As such, it is improper.

Moreover, compounding its material error with respect to the 120-day notice period remedy, the Board also inappropriately expanded the extraordinary notice reading remedy ordered by the ALJ below. The ALJ ordered that Presbyterian Shadyside must:

> During the time the notice is posted, convene the nonclinical support employees, during working time at the Respondent's Pittsburgh,

> Pennsylvania facility, by shifts, departments, or otherwise, and have a responsible management official of the Respondent read the notice to employees or permit a Board agent, in the presence of a responsible management official of the Respondent, to read the notice to employees.

UPMC, 2014 L.R.R.M. (BNA) ¶ 171779 (NLRB Div. of Judges Nov. 14, 2014).

While this extraordinary remedy was the subject of exceptions by Respondent, and Respondent continues to urge the Board to reconsider the propriety of this overbroad and unnecessary relief, the Board improperly – and without explanation – expanded the remedial order by requiring Presbyterian Shadyside to grant the Union access to the employee meeting for the purpose of the notice reading:

> Within 14 days after service of the notice by the Region, hold a meeting or meetings during working time, which shall be scheduled to ensure the widest possible attendance, at which the attached notice marked 'Appendix' is to be read to the nonclinical support employees by shifts, departments, or otherwise, by a responsible management official in the presence of a Board agent and an agent of the Union if the Region or the Union so desires, or, at the Respondent's option, by a Board agent in the presence of a responsible management official, and if the Union so desires, an agent of the Union.

UPMC, 366 NLRB No. 185, 9 (2018).

This expansion is in error. Access rights have been found particularly intrusive by the Board and are a disfavored remedy. *See Dee Knitting Mills, Inc.*, 214 NLRB No. 138 (1974); *United Steelworkers of Am. v. NLRB*, 646 F.2d 616, 638 (D.C. Cir. 1981) (holding that the critical inquiry in determining whether to impose access as a remedial measure is "whether the employer conduct is of such a nature that access is needed to offset harmful effects that have been produced by that conduct."). In *United Steelworkers*, the Court explained that absent the necessity to counter the harmful consequences of an employer's unlawful conduct, access cannot be justified as a remedial measure and instead may directly affront the private property rights of the employer set forth in the U.S. Supreme Court's decision in *NLRB v. Babcock & Wilcox Co.*,

351 U.S. 105 (1956). *Id.* at 639. Accordingly, "before access may be imposed, it is critical that a clear showing be made that access is needed to reassure employees of the existence and vitality of protected legal rights. In granting access as a remedial measure, therefore, a burden lies upon the Board to substantiate its conclusion that access is necessary to offset the consequences of unlawful employer conduct." *Id.* The Court made clear that the Board does not satisfy this burden through "a conclusory statement . . . that access is needed to neutralize effects." *Id.* Rather, "[a]ssumptions must be supported by evidence in the record [and] [t]he seriousness of the violations at issue must be weighed." *Id.*

Here, the Board did not engage in the critical inquiry. In fact, the Board did not make any effort to explain, justify, address, or otherwise articulate a rationale for broadening the notice reading order to include access rights for the SEIU. This unaddressed expansion is particularly troubling given that the SEIU has no representational or access rights with respect to the group of nonclinical support employees at issue and yet the Board is, without explanation, ordering the Hospital to invite the SEIU into the Hospital to participate in one or more meetings with NLRB agents and Hospital management representatives. Further, this access order bears no connection to the unfair labor practice findings of the Board, which do not address access-related issues. Lacking a basis in the record for this expansion, this more onerous remedy is arbitrary and punitive. Under Supreme Court and NLRB precedent, it is improper and should be set aside.

The Board's adoption of the ALJ's special remedies, which already included a broad cease and desist order and the notice reading requirement,[4] combined with its failure to articulate why expansion of these remedies was necessary, demonstrates that they are punitive, rather than

[4] Indeed, the ALJ determined that the broad cease and desist order remedy, which was also the basis of exceptions by Respondent, and the requirement that the notice be read "are sufficient special remedies to address the unfair labor practices that occurred herein." *UPMC*, 2014 L.R.R.M. (BNA) ¶ 171779 (NLRB Div. of Judges Nov. 14, 2014).

remedial in nature. As a result, Respondent respectfully requests that the Board reconsider its findings, orders, and conclusions with respect to the 120-day notice posting period and notice reading.

D. The Board Made a Material Error by Creating a Vague and Overbroad Standard for Employer Investigations

The Board also erred by seemingly announcing a nebulous new subjective standard when it concluded that various investigatory interviews were unlawful under Section 8(a)(1) of the Act.

The Board has repeatedly recognized that, "as part of a full and fair investigation," it may be appropriate for an employer to question an employee about his or her conduct, even if that conduct involved potentially protected activity. *See Fresh & Easy Neighborhood Mkt., Inc.*, 361 NLRB 151 (2014) (agreeing with ALJ that an investigation, which included questioning of an employee about why she felt the need to obtain coworkers' signatures on a document she submitted in support of a sexual harassment complaint and instructions not to obtain additional statements from her coworkers related to the complaint did not violate Section 8(a)(1) of the Act); *see also Consol. Deisel Co.*, 332 NLRB 1019, 1020 (2000) (acknowledging management's legitimate right to investigate potential misconduct issues); *Bridgestone Firestone S.C. & United Steelworkers of Am., AFL-CIO, CLC*, 350 NLRB 526, 528-29 (2007) (finding merit in Respondent's exceptions that it did no more than conduct a proper investigation of employee misconduct and dismissing allegations that Respondent unlawfully interrogated and threatened an employee in violation of Section 8(a)(1)).

Where an 8(a)(1) violation is alleged concerning an employer's investigatory interview, Board precedent demonstrates that the proper legal standard to apply is an objective test, assessing "whether under all the circumstances the employer's conduct reasonably tended to

restrain, coerce, or interfere with employees' rights guaranteed by the Act . . . ." *Stephens Media, LLC*, 356 NLRB 661, 672 (2001). The Board has historically looked at five factors to determine whether questioning is unlawful under Section 8(a)(1): "(1) The background, i.e., is there a history of employer hostility and discrimination? (2) The nature of the information sought, e.g., did the interrogator appear to be seeking information on which to base taking action against individual employees? (3) The identity of the questioner, i.e., how high was he in the company hierarchy? (4) Place and method of interrogation, e.g., was the employee called from work to the boss's office? Was there an atmosphere of unnatural formality? (5) Truthfulness of the reply." *Westwood Healthcare Ctr.*, 330 NLRB 935, 939 (2000).

Here, however, the Board strayed from these established precedents in concluding that Respondent violated the Act by requiring Leslie Poston to write a statement and asking two other employees about their involvement in a potential disciplinary issue. *UPMC*, 366 NLRB No. 185, 3 (2018). Underlying these investigatory interviews was a potential rule violation that Respondent was investigating involving Poston's use of the Hospital's email system. *Id.* at 3-5. As part of its investigation into the potential violation, Presbyterian Shadyside management and human resources personnel asked Poston, Ronald Oakes, and Franklin Lavelle, narrow and targeted questions concerning the conduct at issue. The SEIU alleged, and the Board found, that these investigatory interviews were unlawful under Section 8(a)(1) of the Act. *Id.*

Rather than independently analyze the alleged interrogations under the objective, multi-factor test previously applied by the Board, the Board simply declared that Respondent's actions were a violation because they had a "doubtless coercive effect on the employees' Sec. 7 activities." *Id.* at 3-4 n. 14. To reach this conclusion of a "doubtless coercive" effect, the Board relied on its determination that "Respondent had already conclusively determined to discipline

[the employees] for the conduct they had engaged in before questioning them and/or directing them to provide written statements[.]" *Id.* This finding was not made by the ALJ below. Nor was there any record support for it. In fact, the record was largely bereft of any evidence to support coercion since the General Counsel never even called Lavelle, nor did it ask Oakes any questions about the alleged interrogation.

More concerning, however, is that the Board appears to have inserted a subjective, employer-focused inquiry into what had previously been an objective, employee-focused analysis. The Board did not announce that it was applying a new test or otherwise elucidate whether it was straying from prior precedent. Yet, instead of searching the record for evidence sufficient to evaluate whether a reasonable employee would have found the employer's questioning coercive, as prior Board law requires, the Board focused on the employer's motives for the questioning and what was in the employer's mind when the questioning occurred. How this analysis would be applied in subsequent cases is left only to the imagination. For example, if a human resources representative writes a first draft of a disciplinary document and then asks an employee additional investigatory questions before issuing discipline, would this be conclusive evidence of a pre-determined outcome even if nothing else about the questioning was coercive? What if an employer suspends an employee first (like it did with Leslie Poston) and then waits to question the employee after having questioning all other witnesses – is this evidence of conclusive pre-determination or simply a tactical approach to questioning? The Board has drawn no lines and has left employers with little guidance about how investigatory interviews will be viewed in subsequent cases.

The Board's ill-defined new standard is particularly problematic since, if an employer does not fully interview an employee to whom it is considering issuing discipline, this failure can

be viewed as evidence of pretext under a *Wright Line* analysis, as it was in this very case. *See UPMC*, 2014 L.R.R.M. (BNA) ¶ 171779 (NLRB Div. of Judges Nov. 14, 2014) (confirming the ALJ's finding that "Respondent's lack of investigation into the circumstances surrounding [an employee's] cell phone usage is indicative of a discriminatory motive with respect to the written warning he was given"); *see also Publishers Printing Co., Inc.*, 317 NLRB 933, 938 (1995) (noting the Board has considered an employer's failure to conduct a fair investigation and to give employees the opportunity to explain their actions before imposing disciplinary action to be significant factors in findings of discriminatory motivation); *Burger King Corp.*, 279 NLRB 227, 239 (1986) (concluding employer failed to meet its burden of showing an employee's deficiencies justified his release where the employee was not given "a fair opportunity to defend himself").

The Board's apparent creation of a new standard by which to judge employer investigatory interviews was a material error.[5] And, to the extent the Board was not intending to create a new legal standard, the loose, ambiguous, and factually unsupported conclusions and findings with respect to the investigatory interview allegations require clarification. Respondent respectfully asks that the Board reconsider this aspect of its Decision.

[5] The Board also erred in finding that the Hospital questioning of employee Chaney Lewis as part of an investigation into whether he violated Presbyterian Shadyside's Solicitation Policy was unlawful. *UPMC*, 366 NLRB No. 185, 3 n. 12 (2018). The Board found that the Solicitation Policy was discriminatorily enforced, and then bootstrapped that conclusion into finding that having Lewis document his behavior under the purportedly discriminatorily enforced rule was unlawful. Under *The Boeing Co.*, 365 NLRB No. 154 (2017), however, the Solicitation Policy is not facially invalid. Thus, for Lewis to be coerced, there must either have been evidence that Lewis knew the rule had been disparately enforced, or evidence to support that a reasonable employee would have known that. There is no analysis of *Boeing*. As a result, the Board's conclusion of a violation with respect to Lewis should be reconsidered in light of *Boeing*, which post-dated the ALJ's Decision in this matter. Moreover, the Board adopted the ALJ's finding "for the reasons he stated" that requiring Lewis to write a statement constituted an unlawful interrogation in violation of Section 8(a)(1), but failed to acknowledge that the ALJ did not analyze the factors ordinarily considered in making such a determination. *UPMC*, 366 NLRB No. 185, 3 n. 12. The Board's conclusion should be reconsidered for this additional reason.

E. The Board Made a Material Error by Misstating the Record with Respect to the ESS Council Allegations

In its Decision, the Board also erred by misstating and/or ignoring record evidence. Where the Board makes factual findings in a decision that are at odds with the record, or wholly unsupported by the record, reconsideration is appropriate. *See, e.g., Int'l Bhd. of Elec. Workers, Local 48*, 344 NLRB 829 (2005) (granting Respondent's motion for reconsideration to correct the Board's factual findings where the Board erred in making such findings, and withdrawing those findings together with other findings in the Decision and Order dependent on those facts); *see also Allied Meat*, 221 NLRB No. 60 (1975) (granting motion for reconsideration when the Board erred in stating the record).

Here, the Board misstated and/or ignored the record in reaching its conclusion that Presbyterian Shadyside "dominated or interfered with the formation or administration" of the Environmental Support Services (ESS) Employee Council ("ESS Council"). *UPMC*, 366 NLRB No. 185, 4-6. In this portion of the Decision, the Board concluded that an employee organization which existed for a short period was unlawfully dominated or interfered with by Presbyterian Shadyside in violation of the Act. *Id.* In reaching that conclusion, however, the Board – in multiple respects – erred. For example, at the outset of its discussion of the ESS Council allegations, the Board stated that "[t]he facts are largely undisputed." *Id.* at 4. In fact, however, Presbyterian Shadyside filed 38 exceptions to the ALJ's factual and legal findings concerning the ESS Council, including more than 18 exceptions concerning the ALJ's factual findings. *See* Resp't Presbyterian Shadyside's Exceptions to the ALJ's Decision and Request for Oral Argument, ¶¶ 254-292. Thus, material facts were disputed. The Board's statement to the contrary is inaccurate and suggests that the Board failed to closely review Respondent's exceptions or the record concerning the 8(a)(2) allegations.

Indeed, the Board further stated in its Decision that "Council meeting minutes were prepared by the Respondent, and then posted on department bulletin boards in both the Presbyterian and Montefiore buildings." *Id.* at 5. This is not supported by the record. In fact, it is contradicted. Respondent's witness testified that an employee took ESS Council meeting minutes. (Hr'g Tr. vol. 18, 3025:21-23; 3041:6-23.) The General Counsel's witness also testified to his understanding that meeting minutes were taken and kept by council members. (Hr'g Tr. vol. 9, 1350:18-22.) Neither witness testified that ESS Council meeting minutes were ever posted anywhere.

The Board also reached conclusions based entirely on speculation without reference to the record in support of their ESS Council findings. For example, in response to Member Emmanuel's dissent in which he argued that the ESS Council's cessation of operations after employees became disinterested was relevant to a domination analysis, the Board majority engaged in speculation that "[a]rguably it was because of this domination that employees decided that the council did not provide a meaningful vehicle for their input." *UPMC*, 366 NLRB No. 185, 6 n. 19. There was no support whatsoever for this conclusion in the record.

It is unclear to what extent the Board's factual errors infected its conclusions concerning the legality of the ESS Council, or its conclusions concerning disparate enforcement of the Respondent's Solicitation Policy, for which it relied on its ESS Council findings. *Id.* at 3.

The Board's failure to accurately state and rely upon the record concerning the ESS Council is a material error; as a result, the Board should reconsider this portion of its Decision.

III. CONCLUSION

For these reasons, Respondent respectfully asks that the Board reconsider its Decision and Order.

Respectfully submitted this 24th day of September, 2018.

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CERTIFICATE OF SERVICE

On September 24, 2018, a copy of **UPMC Presbyterian Shadyside's Motion for Full-Board Reconsideration** has been served by First Class Mail on the following:

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